Supreme Court, U.S.
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No. 85-53

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

HUMANA OF AURORA, INC. d/b/a AURORA COMMUNITY HOSPITAL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

This certiorari petition is the latest effort of the Secretary of Health and Human Services to evade repeated judicial condemnation of a regulation allocating costs necessarily incurred by hospitals in furnishing services under Title XVIII of the Social Security Act, 42 U.S.C. § 1395 *et seq.*, commonly known as the Medicare Act. Seven courts of appeals and twenty-six district courts variously have concluded that the apportionment of malpractice insurance premiums under the regulation at issue—the "Malpractice Rule"—violates the Administrative Procedure Act and the Medicare Act. Thus, these courts have held that, under Medicare's cost-based reimbursement system, hospitals are entitled to apportion their overhead costs, including their cost of malpractice insurance, between Medicare

and non-Medicare patients on the basis of each group's relative utilization of the hospital facilities, as required by Medicare regulations.

The courts have rested their decisions on one or both of two grounds. First, many courts have determined that the Malpractice Rule's departure from the Secretary's long-standing policy demanding utilization-apportionment of overhead costs violates the stringent requirements of the Medicare Act, in that it fails to reimburse hospitals for their actual costs of furnishing medical services to Medicare beneficiaries and shifts the costs of furnishing care to Medicare beneficiaries to non-Program patients. Second, the courts have determined that the Secretary's promulgation of the regulation establishing a different apportionment formula for malpractice insurance premiums violates the Administrative Procedure Act, in that it was arbitrary and capricious and that it was not accompanied by an adequate statement of basis and purpose. Based on these determinations, the courts have entered judgments in favor of the hospitals.

The judiciary's enforcement of a utilization formula is not surprising. Since the inception of the Medicare Program in 1965, agency regulations have required that a hospital apportion all overhead costs between Medicare and non-Medicare patients on the basis of the utilization. In 1979, however, the Secretary promulgated the Malpractice Rule. *See generally* 44 Fed. Reg. 31641 (June 1, 1979), *codified at* 42 C.F.R. § 405.452(b)(ii). Under the Malpractice Rule, each hospital is required to isolate malpractice insurance premiums from its overhead account for separate treatment. Instead of the utilization formula required under the Medicare Act, the Malpractice Rule employs a "paid-loss" formula.[1] The Malpractice Rule's departure from the utilization formula is unique, in that the Secretary continues to require hospitals to apportion all other overhead costs on the basis of the Medicare utilization of their facilities, even when a hospital conclusively demonstrates that those costs were in fact disproportionately incurred on behalf of Medicare patients.

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[1] These premiums are apportioned on the basis of the ratio of each hospital's actual malpractice losses paid to Medicare patients during the fiscal year for which reimbursement was sought and the preceding four fiscal years

(footnote continues)

Background of Proceedings

At the close of its fiscal year ending 1980, respondent Humana of Aurora, Inc., which owns and operates Aurora Community Hospital in Aurora, Colorado, submitted an adjudicative claim to the Secretary seeking Medicare reimbursement for malpractice premiums apportioned under the utilization formula. The Secretary denied these claims and instead applied the paid-loss formula under the new Malpractice Rule. Because Aurora had paid all of its $3,000 in malpractice losses during the preceding five years to non-Medicare patients, the Secretary denied Aurora any reimbursement from Medicare for its costs of insurance.

In the alternative, Aurora asked that the Secretary reimburse Aurora for 100 percent of its "Medicare Participation Costs," *i.e,* overhead costs attributable exclusively to Aurora's provision of care to Medicare patients. The Secretary similarly denied these claims, and instead applied the traditional utilization formula.

Aurora appealed the agency adjudicative decisions to the federal district court. *See* 42 U.S.C. § 1395oo(f). In a bench opinion, the United States District Court for the District of Colorado denied both of Aurora's claims. *Humana of Aurora,*

(footnote continued)

compared to total malpractice losses during that period. A hospital that experienced no malpractice losses is required to apportion its premiums on the basis of a "national ratio" established by the Secretary, which in 1979 was set at 5.1 percent.

Aurora contests the Secretary's statement of facts in two important respects. First, in numerous instances the Secretary's description of the agency rulemaking proceeding and record are directly at odds with the decisions of virtually every court that has considered the issue. These discrepancies, however, do not appear material to a determination whether a writ should issue. Second, Aurora notes that the Secretary's estimate of the financial impact of the Rule on the public fisc in her certiorari petition is 50 percent greater than the estimate she offered only two months ago in her notice of proposed rulemaking. *Compare* Petition for Writ of Certiorari, *Heckler v. Abington Mem. Hosp.*, No. 85-52, at 11, *with* 50 Fed. Reg. 25178 (June 17, 1985).

Inc. v. Heckler, Civ. Action No. 83-2-70 (Sept. 19, 1983). On appeal, the Court of Appeals for the Tenth Circuit reversed that decision as to Aurora's claims for malpractice insurance premiums, holding that the Malpractice Rule under which the intermediary had denied Aurora's claim violated the Administrative Procedure Act. *Humana of Aurora, Inc. v. Heckler,* 753 F.2d 1579 (10th Cir. 1985).[2] On remand, the District Court applied the utilization formula to calculate Medicare reimbursement to Aurora for its costs of insurance, and entered judgment for Aurora in the amount of approximately $20,000.

REASONS THE WRIT SHOULD BE DENIED

I. SUMMARY OF ARGUMENT

The Tenth Circuit's decision is consistent with decisions in the Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits.[3] In light of this case law, the Secretary only half-heartedly can argue that a writ should be granted on the grounds that a conflict exists among the circuits on the underlying Medicare reimbursement issue.[4] The Secretary suggests that the decisions are inconsistent with *dicta* offered by the Court of Appeals for the District of Columbia Circuit in

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[2] In light of its disposition of Aurora's claim for malpractice insurance costs, the court did not reach the question of Aurora's claims for Medicare Participation Costs. 753 F.2d at 1583. If the Court should disturb the decision of the lower court regarding Aurora's claim for malpractice insurance premiums, Aurora respectfully requests the Court to remand the case to the Tenth Circuit for consideration of the district court decision denying Aurora's alternative claim.

[3] *Bedford County Mem. Hosp. v. Heckler,* Nos. 84-1672, 84-1757 (4th Cir. August 14, 1985); *Menorah Medical Center v. Heckler,* No. 84-2257 (8th Cir. July 24, 1985); *DeSoto Gen. Hosp. v. Heckler,* No. 84-3577 (5th Cir. July 5, 1985); *Lloyd Noland Hosp. v. Heckler,* 762 F.2d 1561 (11th Cir. 1985); *St. James Hosp. v. Heckler,* 760 F.2d 1460 (7th Cir. 1985); *Abington Memorial Hosp. v. Heckler,* 750 F.2d 242 (3d Cir. 1984); *petition for writ of certiorari filed,* No. 85-52 (July 11, 1985).

[4] Indeed, that request is relegated to a footnote in the last page of her petition. *See* Petition for Writ of Certiorari, *Margaret M. Heckler v. Abington Memorial Hospital,* No. 85-52 at 17 n.14. The Secretary based her request for review of the Tenth Circuit's decision in this case on the reasons offered in the *Abington* petition. *See* Petition for Writ of Certiorari, *Margaret M. Heckler v. Humana of Aurora, Inc.,* No. 85-53, at 4-5.

vacating a district court decision that had upheld the Secretary's actions.[5] The District of Columbia Circuit's *dicta,* however, does not conflict with the holdings of the other seven circuits, and certainly does not justify granting her petition.

The Secretary instead emphasizes a procedural issue she hopes will warrant review. In brief, the Secretary claims that the lower courts erred in entering money judgments for the hospitals. The Secretary contends that the lower courts should have remanded the entire matter to the agency for additional rulemaking proceedings so as to give the Secretary the opportunity to repromulgate the Malpractice Rule. Further, the Secretary implies that the Court's intervention to correct this procedural error of the lower courts is appropriate even if the substantive issue should not be reviewed.

To underscore the propriety of this relief, the Secretary advises the Court that she has initiated a "new" rulemaking proceeding which, in her words, "build[s] on the experience of the judicial *criticism* of the 1979 rule,"[6] as she prefers to describe the thirty-three court decisions that have unequivocally repudiated her actions. The Secretary fails to note, however, that, insofar as Aurora is concerned, this proposed rule is identical to the 1979 Rule already invalidated by the Tenth Circuit: Under the "new" formulation Aurora would receive no reimbursement for its costs of malpractice insurance.[7] This

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[5] *See* Petition for Writ of Certiorari, *Heckler v. Abington Mem. Hosp.*, No. 85-52, at 14-15, *citing Walter O. Boswell Mem. Hosp. v. Heckler,* 749 F.2d 788 (D.C. Cir. 1984). The Secretary also suggests that these decisions "conflict" with a special concurring opinion to the Fifth Circuit's decision that also invalidated the Secretary's actions. *See* Petition for Writ of Certiorari, *Heckler v. Abington Mem. Hosp.*, No. 85-52, at 14 n.11, *citing DeSoto Gen. Hosp. v. Heckler,* No. 84-3577, slip op. at 11 (5th Cir. July 5, 1985) (Garza, J., specially concurring).

[6] *See* Petition for Writ of Certiorari, *Heckler v. Abington Mem. Hosp.*, No. 85-52, at 5 (emphasis added).

[7] The 1985 proposed version of the rule is identical to the 1979 Rule in all important respects. The single substantive difference is that under the 1985 Rule the "national ratio" for hospitals with no malpractice losses during the relevant five-year period is set at 11.6 percent rather than 5.1 percent under the Rule that has been declared invalid. *Compare* 44 Fed. Reg. 31642 (1979) *with* 50 Fed. Reg. 25178 (1985); *see* note 1 *supra.*

proceeding, nevertheless, is limited to evaluating whether the Court should review the lower courts' decisions that the calculation of Medicare reimbursement to the hospitals under the 1979 Malpractice Rule is illegal, and that the hospitals are entitled to reimbursement for malpractice insurance premiums under a utilization formula.

Respondent Aurora concurs with the apparent position of the Secretary that there is no need for "plenary" review by the Court of this case. Aurora, however, submits that no review is necessary because both the substantive and procedural issues the Secretary has invited the Court to examine are simply manufactured attempts to delay her day of reckoning with the statutory mandates she has been directed to implement. Therefore, respondent Aurora respectfully requests the Court to deny the Secretary's petition for writ of certiorari.

II. SUPREME COURT REVIEW OF THE DECISIONS INVALIDATING THE SECRETARY'S MALPRACTICE RULE IS NOT WARRANTED

The Secretary's own petition adequately discloses why review of the substantive reimbursement issue is unwarranted: There is no real conflict among the lower courts. Seven appellate courts have rejected the Secretary's analysis.[8] Twenty-six district courts also have invalidated the Secretary's actions.[9] Further, of the six district court decisions that upheld

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[8] *Bedford County Mem. Hosp. v. Heckler*, Nos. 84-1672, 84-1757 (4th Cir. August 14, 1985); *Menorah Medical Center v. Heckler*, No. 84-2257 (8th Cir. July 24, 1985); *DeSoto Gen. Hosp. v. Heckler*, No. 84-3577 (5th Cir. July 5, 1985); *Lloyd Noland Hosp. v. Heckler*, 762 F.2d 1561 (11th Cir. 1985); *St. James Hosp. v. Heckler*, 760 F.2d 1460 (7th Cir. 1985); *Humana of Aurora, Inc. v. Heckler*, 753 F.2d 1579 (10th Cir. 1985); *Abington Memorial Hosp. v. Heckler*, 750 F.2d 242 (3d Cir. 1984).

[9] *Mt. Carmel Mercy Hospital v. Heckler*, 581 F. Supp. 1311 (E.D. Mich. 1983); *Chelsea Community Hospital v. Heckler*, Civ. No. 83-6126-AA (E.D. Mich. Dec. 20, 1983); *Abington Mem. Hosp. v. Heckler*, 576 F. Supp. 1081 (E.D. Pa. 1983), *aff'd* 750 F.2d 242 (3d Cir. 1984); *Albany General Hospital v. Heckler*, 584 F. Supp. 614 (D. Ore. 1984); *St. James Hospital v. Heckler*, 579 F. Supp. 757 (N.D. Ill. 1984); *aff'd*, 760 F.2d 1460 (7th Cir. 1985); *Humana of Illinois, Inc. d/b/a Springfield Community Hospital v. Heckler*, 584

(footnote continues)

the Rule, two have been vacated or reversed; [10] the third case has been effectively overruled by a subsequent appellate decision in that circuit; [11] and the last three, which were all

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(footnote continued)

F. Supp. 618 (C.D. Ill. 1984), *aff'd*, 760 F.2d 1460 (7th Cir. 1985); *Bedford County Mem. Hosp. v. Heckler*, Nos. 84-1672, 84-1757 (4th Cir. August 14, 1985), *aff'g* 583 F. Supp. 367 (W.D. Va. 1984); *Alexandria Hospital v. Heckler*, 586 F. Supp. 581 (E.D. Va. 1984); *Lloyd Noland Hospital and Clinic v. Heckler*, Civ. No. 83-PT-0868-S (N.S. Ala. Apr. 6, 1984), *aff'd*, 762 F.2d 1561 (11th Cir. June 12, 1985); *Metropolitan Hospital, Inc. v. Heckler*, Civ. No. C83-502A (N.D. Ga. June 25, 1984), *aff'd*, Nos. 84-7444, 84-8699 (11th Cir. June 12, 1985); *Parkway Medical Center, et al. v. Heckler*, Civ. Nos. 83-1005, 83-1700 (S.D. Fla. Sept 24, 1984); *DeSoto General Hospital v. Heckler*, Civ. No. 83-1050-B (M.D. La. June 22, 1984), *aff'd*, No. 84-3577 (5th Cir. July 5, 1985); *East Jefferson General Hospital v. Heckler*, Civ. No. 83-4107-C (E.D. La. Oct. 19, 1984); *Menorah Medical Center v. Heckler*, Civ. No. 83-0822-CV-W-4 (W.D. Mo. July 26, 1984), *aff'd* No. 84-2257 (8th Cir. July 24, 1984); *Mercy Medical Center and Unity Medical Center v. Heckler*, Civ. No. 3-82-Civ. 1724 (D. Minn. Aug. 17, 1984); *Sisters of St. Mary, et al. v. Heckler*, Civ. Nos. 83-0789C(4), 83-1604(C) (E.D. Mo. Nov. 6, 1984); *Arkansas Methodist Hospital, et al. v. Heckler*, Civ. Nos. J-C-83-106, J-C-83-148 (E.D. Ark. Nov. 1, 1984); *St. Anthony Regional Hospital, et al. v. Heckler*, Civ. No. C-84-37 (N.D. Iowa Oct. 12, 1984); *Marshalltown Area Community Hospital v. Heckler*, Civ. No. 84-226-B (S.D. Iowa Dec. 17, 1984); *Bethesda Hospital v. Heckler*, Civ. No. C-1-83-622 (S.D. Ohio Apr. 30, 1985); *St. Joseph's Hospital v. Heckler*, 583 F. Supp. 1545 (D. Ariz. 1984). Three other district courts have invalidated the Malpractice Rule in decisions not identified by the Secretary in her petition. *Charter Med. Corp. v. Heckler*, 604 F. Supp. 638 (M.D. Ga. 1985); *Tallahassee Mem. Regional Med. Ctr. v. Heckler*, TCA-83-7128-WS (N.D. Fla. June 21, 1985); *Brentwood Hospital, Inc. v. Schweiker*, Civ. No. 83-0502 (W.D. La. July 3, 1985). Finally, two other district courts have invalidated the rule since the Secretary filed her petition for certiorari. *Adair County Health Center, Inc. v. Heckler*, Civ. Action No. 84-771-E (W.D. Okla. July 24, 1985) and *Lifemark Hospitals of Texas, Inc. v. Heckler*, No. 6-83-315 (S.D. Tex. August 14, 1985).

[10] As noted above, the *Aurora* district court had upheld the Secretary but was reversed by the Tenth Circuit. The District of Columbia District Court had upheld the Secretary, *see Walter O. Boswell Mem. Hosp. v. Heckler*, 573 F. Supp. 884 (D.D.C. 1983), but the decision was vacated because the Secretary had not filed the rulemaking record for the court's consideration. 749 F.2d 788 (D.C. Cir. 1984).

[11] The decision in *Normandy Osteopathic-North Hospital v. Heckler*, Civ. No. 83-1687C(1) (E.D. Mo. Dec. 21, 1984), was effectively overruled by the Eighth Circuit's decision in *Menorah Medical Center v. Heckler*, No. 84-2257 (8th Cir. July 24, 1985).

rendered by district courts in Tennessee on the strength of one opinion, are all pending on appeal.[12] Given the overwhelming judicial rejection of the Secretary's analysis, further review by the courts is unwarranted.

The Secretary tries to manufacture a conflict among the circuits by extensive reliance on the District of Columbia Circuit's decision in *Walter O. Boswell Memorial Hospital v. Heckler,* 749 F.2d 788 (D.C. Cir. 1984), the only appellate decision that has not squarely repudiated the Secretary's analysis. The *Boswell* appellate court was confined to remanding the case to the district court because the full rulemaking record developed by the Secretary in promulgating the Malpractice Rule had not been presented to the district court. 749 F.2d at 793. The District of Columbia Circuit then set forth standards, described by the court itself as "guidelines," to assist the *Boswell* district court in its review on remand. 749 F.2d at 798. The Secretary now argues that these "guidelines," to the extent they are inconsistent with the decisions of thirty-three other courts, create a conflict among the lower courts warranting review.[13] The *Boswell dicta,* however, is not a sufficiently authoritative statement upon which a conflict can be based.

Furthermore, if the *Boswell dicta* is even briefly analyzed, it becomes clear that the Secretary has extracted literally the only segment of the *Boswell* decision in which the District of Columbia Circuit cast any doubt on any theory proposed by the hospitals.[14] In other portions of the *dicta,* the District of Columbia Circuit suggests that the precise factual basis for

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[12] *Athens Community Hospital v. Heckler,* 565 F. Supp. 695 (E.D. Tenn. 1983). In the other two decisions, *Cumberland Medical Center v. Heckler,* 578 F. Supp. 39 (M.D. Tenn. 1983), and *Benton County General Hospital v. Heckler,* Civ. No. 82-1289 (W.D. Tenn. Oct. 25, 1983), *appeal pending,* No. 84-5042 (6th Cir.), the district courts entered judgment in part on *res judicata* grounds, because for unexplained reasons hospitals that had presented their claims in the unsuccessful *Athens* case had also presented their claims in the subsequent lawsuits.

[13] *See* Petition for Writ of Certiorari, *Heckler v. Abington Mem. Hosp.,* No. 85-52, at 8, *citing Boswell, supra,* 749 F.2d at 802.

[14] The Secretary's assertion that the *Boswell* court "noted that the new rule is a 'fair formulation of HHS's statutory mandate' " takes the *Boswell* statement out of context. *See* Petition for Writ of Certiorari, *Heckler v.*

(footnote continues)

some of the Secretary's conclusions was "obscure." 749 F.2d at 795. The *Boswell* court similarly implies that if, as the Tenth Circuit found, the Secretary had no rulemaking evidence to support other conclusions, the Rule was "arbitrary and capricious." *Compare Boswell, supra,* 749 F.2d at 799, *with Aurora, supra,* 753 F.2d at 1582. The District of Columbia Circuit also describes other aspects of the Secretary's rulemaking actions as "curious," 749 F.2d at 802; characterizes other findings as apparently supported only by "post hoc rationalizations of counsel," *id.* at 803; and states, "There are two important aspects of the problem that HHS may have failed entirely to have considered in a reasoned fashion." 749 F.2d at 798. In sum, the *Boswell dicta* is consistent with the general rejection of the Malpractice Rule by other circuits, and certainly does not give rise to a conflict among the circuits that warrants Supreme Court review.[15]

(footnote continued)

Abington Mem. Hosp., No. 85-52, at 8, *citing Boswell, supra,* 749 F.2d at 802. In that portion of its decision, the *Boswell* court evaluated the assertion of the plaintiffs that the rule was arbitrary and capricious because, in the short term at least, it resulted in "superficially peculiar results." 749 F.2d at 802. The *Boswell* court tentatively rejected this analysis, because any short term variations would be eliminated in the long run. The *Boswell* court concluded that a rule that resulted in an equitable "long run average" constituted a "fair formulation of HHS's statutory mandate," reasoning that the fact "that some hospitals may suffer in the short run . . . does not make the Malpractice Rule invalid." *Id.* As evidenced by the court's delineation of the Rule's other defects, the passage cited by the Secretary did not constitute an endorsement of the Rule.

[15] The Secretary's invocation of Judge Garza's four-sentence special concurrence in *DeSoto Gen. Hosp. v. Heckler,* No. 84-3577 (July 5, 1985), to suggest discord among the circuits is also inappropriate. *See* Petition for Writ of Certiorari, *Heckler v. Abington Mem. Hosp.*, No. 85-52, at 14 n.11, *citing DeSoto, supra,* slip op. at 11. In *DeSoto* the district court had ruled that the Malpractice Rule was invalid because it was arbitrary and capricious, and had entered judgment against the Secretary which "remanded [the case] to the Secretary for further consideration in accordance with this opinion." *DeSoto Gen. Hosp. v. Heckler,* No. 83-1050B (M.D. La. June 22, 1984). The Fifth Circuit, in a decision in which Judge Garza *concurred,* affirmed the district court's ruling, but modified the judgment "to the extent we remand to [the Secretary] *for payment of the appellees' . . . costs . . . without reference to the abrogated malpractice rule." DeSoto, supra,* slip op. at 2 (emphasis added).

III. THE COURT SHOULD NOT REVIEW THE ENTRY OF JUDGMENT FOR AURORA

Rather than insisting on review of the substantive issues, the Secretary encourages the Court simply to review and to vacate the lower court's entry of judgment for Aurora. *Petition for Writ of Certiorari, Heckler v. Humana of Aurora, Inc.,* No. 85-53 at 4. Apparently believing that the relief entered by the lower courts justifies review even if the substantive decisions do not, the Secretary offers two reasons for vacating and remanding the judgments. First, the Secretary argues that the lower courts, upon invalidating the Secretary's actions, did not have the authority to grant Aurora the relief it sought.[16] Instead, the Secretary suggests that, once the courts had found an error of law, a remand of the entire matter was appropriate. Second, the Secretary explains that remand is appropriate because she will have promulgated a new Rule before "this Court could hear the case on the merits," [17] and that at that time it would be incumbent on this Court to apply the new rule.[18] To avoid having this Court serve as the initial forum in which the legality of the new rule is tested, the Secretary suggests that the easiest course is a remand to present the issue to the lower courts in the first instance.[19] There are several reasons the Secretary's arguments should be rejected.

A. The Medicare Act Clearly Anticipates Entry Of Judgments By The Courts

The first step in determining whether the lower courts' entry of judgment was appropriate is to examine the provisions of the Medicare Act regarding administrative and judicial review of reimbursement disputes. A review of the Act discloses that entry of judgment by the courts is routine.

The Medicare Act details a system of administrative and judicial review to resolve reimbursement disputes. *See gener-*

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[16] *See* Petition for Writ of Certiorari, *Heckler v. Abington Mem. Hosp.*, No. 85-52, at 15-16.

[17] *Id.* at 16.

[18] *Id.*

[19] *Id.*

ally 42 U.S.C. § 1395oo. At the close of its fiscal year the hospital first files a "cost report" with a "fiscal intermediary," usually a private insurance company that has contracted with the Secretary to administer the program. 42 U.S.C. § 1395h. The fiscal intermediary audits the cost report and makes an initial determination allowing or disallowing reimbursement for the costs claimed by the hospital. *Id.*

If the hospital is dissatisfied with the fiscal intermediary's determination, it is entitled to appeal the disallowance of the claim to the Provider Reimbursement Review Board ("Board"), an adjudicative panel within the Department of Health and Human Services. 42 U.S.C. § 1395oo. After an on-the-record evidentiary hearing, the Board issues a decision affirming, reversing or modifying the initial denial of the claim. *Id.* § 1395oo(d).[20] A hospital may then seek judicial review of the decision of the Board. *Id.* § 1395oo(f).

Under certain circumstances this agency process is abbreviated. *See generally* 42 U.S.C. 1395oo(f)(1). Congress has specified that, after a hospital has appealed an intermediary's decision, the Board may certify it is without authority to decide the issue. Pub. L. No. 96-499, Title IX, 955 (Dec. 5, 1980), *codified at* 42 U.S.C. § 1395oo(f)(1).[21] Upon receiving this certification, the hospital is entitled "to obtain judicial review of any action of the fiscal intermediary . . . ." *Id.*[22]

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[20] The Secretary may elect to review a decision of the Board, and affirm, reverse or modify the Board's decisions. *Id.* A hospital is then entitled to seek judicial review of the decision of the Board or the Secretary. 42 U.S.C § 1395oo(f).

[21] By regulation, the Board cannot consider an initial determination denying a hospital's claim in amounts in excess of that allowed by regulation. 42 C.F.R. § 405.1829(a).

[22] Indeed, hospitals can seek judicial review of Medicare cost reimbursement disputes only as specified under 42 U.S.C. § 1395oo. *E.g., Heckler v. Ringer,* 104 S. Ct. 2013 (1984); *Schweiker v. McClure,* 456 U.S. 188 (1982); *United States v. Erika, Inc.,* 456 U.S. 201 (1982); *Califano v. Sanders,* 430 U.S. 99 (1977); *Mathews v. Eldridge,* 424 U.S. 319 (1976); *Weinberger v. Salfi,* 422 U.S. 749 (1975); *Hadley Memorial Hospital, Inc. v. Schweiker,* 689 F.2d 905 (10th Cir. 1982); *Hopewell Nursing Home, Inc. v. Schweiker,* 666 F.2d 34 (4th Cir. 1981); *Humana of South Carolina, Inc. v. Califano,* 590 F.2d 1070 (D.C. Cir. 1978); *Rhode Island Hospital v. Califano,* 585 F.2d 1153 (1st Cir. 1978); *Association of American Medical Colleges v. Califano,* 569 F.2d 101 (D.C. Cir. 1977).

Here, as required by statute, Aurora presented its claim for reimbursement of malpractice insurance costs and, after the intermediary denied these claims and the Board certified that it did not have authority to decide the issue, Aurora exercised its right to seek judicial review "of [the] action of the fiscal intermediary." [23] The issue before the courts was the intermediary's denial of Aurora's claim for reimbursement malpractice insurance costs calculated under a utilization formula. 42 U.S.C. § 1395oo(f).[24]

Once the essential character of Aurora's lawsuit is recognized, the propriety of the lower court's entry of relief for Aurora is not controversial. On remand from the Tenth Circuit the district court reversed the intermediary's disallowance of Aurora's utilization-formula claims for malpractice insurance—inasmuch as it was based on a regulation invalidated by the circuit court—and entered judgment for Aurora.[25] In fact, on remand to the district court the Secretary did not oppose Aurora's Motion for Entry of Judgment, which constitutes an

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[23] *See* Complaint, *Humana of Aurora, Inc. v. Schweiker,* No. 83-Z-70, filed January 13, 1983, ¶¶ 29, 33, 38, 39.

[24] Aurora challenged the fiscal intermediary's decision denying its claim for reimbursement of premiums on a variety of grounds. For example, Aurora alleged that the intermediary's application of the Malpractice Rule to calculate Aurora's reimbursement for FYE 1980 was illegal because it failed to apportion Aurora's cost of malpractice insurance on the basis of the relative utilization of Aurora's facility, in violation of 42 U.S.C. § 1395x(v)(1)(A). *See* Complaint, *Humana of Aurora, Inc. v. Schweiker,* No. 83-Z-70, filed January 13, 1983, Count III, ¶ 55. In addition, Aurora alleged *inter alia,* that denial of its reimbursement claims by the intermediary was illegal because the Malpractice Rule itself violated the Medicare Act and was promulgated in violation of the Administrative Procedure Act. *Id.* Count I. That Aurora alleged that the intermediary's decision was illegal because the Secretary's Malpractice Rule violated the Medicare Act and the Administrative Procedure Act, however, does not change the "essential character and objective" of Aurora's suit: This is an action to recover on a reimbursement claim. *Cf. Weinberger v. Salfi,* 422 U.S. 749, 760 (1975); *Humana of South Carolina, Inc. v. Califano,* 590 F.2d 1070, 1080 (1978).

[25] *See* Order dated May 2, 1985, *Humana of Aurora, Inc. v. Heckler,* Civ. Action No. 83-Z-70 (Appendix A).

In support of its April 25, 1985 motion, Aurora submitted the affidavit of Mr. Leonard E. Verbeke, Director of Reimbursement, Audits and Appeals for

(footnote continues)

explicit acknowledgment by the Secretary that there is nothing else to be litigated.

The propriety of entry of money judgment for Aurora is underscored by the relief provisions in the Medicare Act itself. The Act explicitly anticipates entry of money judgment by the courts:

> Where a [hospital] seeks judicial review pursuant to paragraph [1395oo(f)(1)], the amount in controversy shall be subject to annual interest . . . *to be awarded by the reviewing court in favor of the prevailing party.*

42 U.S.C. § 1395oo(f)(2) (emphasis added). Indeed, the entry of judgment in a Medicare Act case is so routine that in a decision of the Ninth Circuit only three weeks ago, the court entered judgment for a Medicare Act plaintiff, noting, "[*T*]*here is nothing novel about our actions.*"[26]

In sum, the Medicare Act clearly anticipates that money relief should be entered by the courts.

B. Entry Of Judgment By The Lower Courts Is Consistent With General Principles Of Administrative Law

The entry of judgment by the lower courts is also consistent with general administrative law. Contrary to the Secretary's assertion,[27] the choice between remand or entry of judgment is within the court's discretion. *E.g., Zuber v. Allen,* 396 U.S.

(footnote continued)

respondent, identifying the total malpractice insurance premiums incurred by Aurora in FYE 1980, Aurora's relative Medicare utilization rate and the aggregate amount of reimbursement Aurora was due. The Secretary did not contest any of these calculations.

[26] *Vista Hill Foundation, Inc. v. Heckler,* slip op. at 23 & n.9, No. 83-2391-EB (9th Cir. July 29, 1985) (emphasis added), *citing Villa View Community Hosp. v. Heckler,* 720 F.2d 1086 (9th Cir. 1983); *Memorial, Inc. v. Harris,* 655 F.2d 905 (9th Cir. 1980); *Pacific Coast Medical Enterprises v. Harris,* 633 F.2d 123 (9th Cir. 1980).

[27] *See* Petition for Writ of Certiorari, *Heckler v. Abington Mem. Hosp.,* No. 85-52, at 15-16.

168, 196 (1969). When this Court has remanded a matter to an agency after invalidating an agency's action, it has done so only because it was appropriate under "the particular circumstances of [the] case." *E.g., American Trucking Associations, Inc. v. United States,* 364 U.S. 1, 17 (1960). Conversely, the lower courts have repeatedly exercised their inherent authority to enter judgment in favor of private parties after invalidating an agency action, both in cases affirmed by the Court on appeal, *e.g., United States v. Pacific Coast Wholesalers' Ass'n,* 338 U.S. 689 (1950), *aff'g* 81 F. Supp. 991 (S.D. Cal. 1949); *Shannon v. United States,* 377 U.S. 311 (1964), *aff'g* 219 F. Supp. 781 (W.D. Tex. 1963), as well as in cases which the government has not appealed. *E.g., Garrett Freightlines, Inc. v. United States,* 315 F. Supp. 199 (D. Utah (1970); *Pennsylvania R.R. v. United States,* 202 F. Supp. 584 (E.D. Pa. 1962). Thus, the Secretary's assertion that a remand is the "guiding principle" of administrative law [28] "[fails] to point out that the statement [is] only . . . a "guiding principle" . . . [and] is, by no means, an inflexible rule applicable to all proceedings." [29] In particular, a remand is inappropriate when it would be an "idle and useless formality," *NLRB v. Wyman-Gordon Co.,* 394 U.S. 759, 766 n.6 (1969) (plurality opinion). Because the Secretary did not contest the amounts at issue, remand here was unnecessary.[30]

It is in this context that the Secretary's reliance on other administrative law cases must be evaluated. Entry of money judgment here is not inconsistent with the Court's decision in *Burlington Northern, Inc. v. United States,* 459 U.S. 131 (1982), because of the differences in the statutes at issue. Under the provision of the Interstate Commerce Act interpreted in *Burlington Northern,* the lower court's authority extended merely to the ICC's orders, and not to the rates themselves.

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[28] *See* Petition for Writ of Certiorari, *Heckler v. Abington Mem. Hosp.,* No. 85-52, at 15-16, *citing FPC v. Idaho Power Co.,* 344 U.S. 17, 20 (1952).

[29] *Arkansas-Best Freight System, Inc. v. United States,* 364 F. Supp. 1239, 1268 (W.D. Ark. 1973), *rev'd on other grounds sub nom. Bowman Transp., Inc. v. Arkansas-Best Freight Systems, Inc.,* 419 U.S. 281 (1974), *quoting Federal Power Commission v. Idaho Power Co.,* 344 U.S. 17 (1952).

[30] *See* note 26 *supra* and accompanying text.

Burlington Northern, supra, 459 U.S. at 141, *citing* 28 U.S.C. § 2349. Here, in contrast, the Medicare Act explicitly extends the courts' authority to both the agency's decision and to the amount paid.[31]

Similarly, entry of judgment by the lower courts is not inconsistent with *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29 (1983). Unlike the *Motor Vehicles* plaintiff, which merely had challenged a rulemaking proceeding, Aurora here presented its individual claim for reimbursement in an agency adjudicatory proceeding before seeking judicial review. In this litigation Aurora sought judicial review of the agency's order denying its claims, *see* note 24 *supra,* and once that order was found illegal, entry of judgment by the courts was required. *NLRB v. Wyman-Gordon Co.,* 394 U.S. 759, 766 & n.6 (1969). Thus, entry of judgment for Aurora in this case was consistent with general administrative law principles.

C. The Secretary's Proposal To Limit Courts To The Remedy Of Remand Is Unworkable

The Secretary's interpretation of the case law would result in never-ending litigation before both the agencies and the courts. If the Secretary's view is adopted, the agency rulemaking process will never come to an end because the Secretary would always have the opportunity to repromulgate a "new" rule. Here, for example, the Secretary is asking for the opportunity to embark on another round of litigation, even though this issue has been in dispute for nearly six years.

Moreover, the Secretary's interpretation would effectively eliminate the requirement that agency regulations must be sustainable on the basis of the administrative record before the

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[31] *See* notes 25-26 *supra* and accompanying text.

decisionmaker at the time he made his decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Accepting the Secretary's position would "convert judicial review of agency action into a ping-pong game," *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969), because it would allow an agency to rewrite an administrative record *ad infinitum* simply by reopening rulemaking proceedings any time a regulation is invalidated. Neither of these results should be sanctioned by the courts.

D. The Pendency Of New Rulemaking Proceedings Does Not Justify Issuance Of A Writ

Finally, the Secretary offers the novel argument that a writ should be granted because she has undertaken new rulemaking proceedings which will be complete by the time the Court hears this case. She then reasons because this Court would be obliged to apply that new regulation, a remand is appropriate to insure that the new rule is first evaluated by the lower courts. This argument is flawed in several respects.

First, the Secretary's argument is presumptuous. The issue whether the Court should hear this case is distinct from how the Court should dispose of this case if it grants the Secretary's petition. Thus, this argument is relevant, if at all, only if the Secretary has convinced the Court a writ should issue.

Second, the Secretary is attempting to convert Supreme Court review into a catch-all device to avoid the operation of judgments, even though there are other provisions which specify when the Secretary can obtain such relief. Rule 60 of the Federal Rules of Civil Procedure explicitly delineates the circumstances in which a party is entitled to relief from a judgment or order. Similarly, the Medicare Act contains extensive provisions dictating the situations in which the Secretary can recoup amounts previously paid to providers. *See generally* 42 U.S.C. § 1395gg. If the Secretary is entitled to relief from the lower courts' judgments, she should be required to resort to those procedures, which define the circumstances in which such relief is to be available.

Any other approach would yield untenable results. If the Secretary's rationale is accepted, any agency could evade the operation of any unfavorable appellate decision, simply by filing a *certiorari* petition and simultaneously publishing a notice of proposed rulemaking re-enacting the invalidated rule. Further, the Secretary's position, if accepted, would reduce Supreme Court review of lower court decisions invalidating agency actions into a race, in which the agency attempts to complete its new rulemaking before the Court rules upon the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons the Court should deny the Secretary's petition for writ of certiorari.

Respectfully submitted,

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Dated: August, 1985

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

HUMANA OF AURORA, INC. d/b/a
AURORA COMMUNITY HOSPITAL,
Plaintiff,

v.

MARGARET M. HECKLER, Secretary
of the Department of Health
and Human Services
Defendant.

**Civil Action
No. 83-Z-70**

[Filed May 2, 1985]

ORDER

Upon motion of plaintiff Humana of Aurora, Inc., it is hereby

ORDERED, that judgment is entered in favor of plaintiff Humana of Aurora, Inc. in the amount of $18,460, plus interest as calculated pursuant to 42 U.S.C. § 1395oo(f), and it is further

ORDERED, that the Secretary shall make payment to plaintiff in said amount within thirty (30) days of this Order.

Entered this 2nd day of May, 1985.

/s/ ZITA L. WEINSHIENK

United States District Judge